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Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services

FILE: EAC 02 027 53026 Office: VERMONT SERVICE CENTER Date: **SEP 01 2004**

IN RE: Petitioner:  
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to  
Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned  
to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Vermont Service Center, and subsequently summarily dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on a motion to reopen. The motion will be granted, the AAO's previous summary dismissal will be withdrawn and director's decision will be affirmed. The appeal will be dismissed.

The petitioner is a service station and auto repair business. It sought to classify the beneficiary as an employment based immigrant pursuant to section 203(b)(3) of the Immigration and Nationality Act, (the Act), 8 U.S.C. § 1153(b)(3), as a skilled worker. The petitioner sought to employ the beneficiary permanently in the United States as an auto mechanic. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor.

On September 24, 2002, the director determined that the petitioner had not established that it had the continuing financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition, February 28, 2001.

Former counsel filed a timely appeal, received on October 22, 2002. It indicated only that the director's decision was arbitrary and that the employer was eligible to employ the alien. Former counsel stated that a brief would be submitted within 30 days. The AAO summarily dismissed the petitioner's appeal on October 28, 2003, finding that no brief had been submitted to the record and that the appeal did not specifically identify any erroneous conclusion of law. Current counsel timely submitted a motion to reopen, asserting that a brief, dated November 16, 2002, was actually submitted to the AAO by former counsel within the deadline and that the appeal should be considered on the merits. Current counsel submits a copy of the brief and exhibits previously submitted, but not acknowledged by the AAO's previous decision.

Pursuant to 8 C.F.R. § 103.5(a)(2), a motion to reopen must state new facts to be provided and must be supported by affidavits or other documentary evidence. As current counsel has submitted sufficient new evidence to be considered in support of his motion, and in the interest of fairness, the AAO will withdraw its previous decision and consider the appeal on the merits as filed by former counsel (hereinafter "counsel").

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

*Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by

evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 CFR § 204.5(d). Here, as noted above, the Form ETA 750 was accepted for processing on February 28, 2001. The proffered wage as stated on the Form ETA 750 is \$19.11 per hour, which amounts to \$39,748.80 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

On the petition, the petitioner claims to have been established in 1993, to have a gross annual income of \$430,000, and to currently employ five workers. In support of its ability to pay the beneficiary's proposed wage offer of \$39,748.80 per annum, the petitioner initially submitted a copy of the petitioner's Form 1120S, U.S. Income Tax Return for an S Corporation for 2000. It shows that the petitioner uses a standard calendar year to file its tax returns. It also reflects that it has three principal shareholders. "Surash Baral" is a 50% shareholder, while "Ramji Prajapati" and "Nani Shrestha"<sup>1</sup> both are 25% shareholders. The tax return indicates that the petitioner reported a net income of \$5,720 in 2000. Schedule L of the tax return reflects that the petitioner had \$16,236 in current assets and reported no current liabilities, resulting in net current assets of \$16,236. Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>2</sup> Besides net income, Citizenship and Immigration Services (CIS) will consider a petitioner's net current assets as an alternative method of reviewing its ability to pay the proposed wage offer. A corporation's year-end current assets and current liabilities are shown on Schedule L of its federal tax return. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on December 12, 2001 and on March 18, 2002, the director requested additional evidence pertinent to that ability, and advised the petitioner to submit evidence showing that it had the ability to pay the proffered salary as of the priority date of February 28, 2001 and continuing to the present.

In response, counsel submitted a letter from Mr. Prajapati asserting his willingness to help the petitioner along with his personal financial statement and letters from two different financial institutions attesting to Mr. Prajapati's individual good standing. Counsel also submitted letters from the other two shareholders. Mr. Baral states in a letter, dated January 28, 2002, that as a president of another corporation, he can state that the

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<sup>1</sup> It is unclear from the record if the beneficiary and Nani Shrestha are related.

<sup>2</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

petitioner has a line of credit with this business "amounting to \$40,000," which he individually guarantees. [REDACTED] letter states that he individually has three homes and an individual bank line of credit. A letter from a bank gives the balances of [REDACTED] individual checking account and home equity line of credit. Counsel also submits a copy of the petitioner's checking account statement with SunTrust covering the month of December 2001 and showing an ending balance of \$4,381.23 as of December 31, 2001, along with two other checking account statements for March 2002 and April 2002. The ending balance as of March 31, 2002 was \$1,180.71 and the ending balance as of April 30, 2002 was \$9,087.32. Finally, counsel subsequently submitted letters from January and February 2002 indicating that [REDACTED] was selling his shares of the petitioner to the other two shareholders. A copy of a document entitled "Informal of the Shareholders of [REDACTED]" dated February 28, 2002, and copies of stock certificates reflect that the petitioner's only two shareholders are [REDACTED].

Along with the evidence, Counsel's transmittal letters expresses the belief that the principles set forth in *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) should apply to the petitioner as it is a well-established, growing business.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on September 24, 2002, denied the petition. The director concluded that neither the petitioner's net income, nor net current assets, as shown on its 2000 tax return, were sufficient to cover the proffered wage. The director also reviewed the petitioner's three bank statements submitted to the record, as well as the personal financial statements and information from the shareholders and determined that the evidence did not establish the petitioner's ability to pay the proffered salary.

On appeal, counsel submits copies of the previously submitted checking account statements from March 31<sup>st</sup> and April 30<sup>th</sup>, 2002, as well as copies of the previously submitted bank letters attesting to the individual shareholders' bank accounts and personal lines of credit. Counsel also renews his claim that the petitioner's gross receipts of more than \$430,800, as shown on the 2000 tax return, as well as increasing business, credit lines, and financial backing, have established its ability to pay the proffered salary. Counsel claims that \$48,999 was available to the petitioner if the figures on the 2000 tax return for wages paid (\$24,425), net income of (\$5,720), depreciation of (\$2,617), and current assets (\$16,237) were all combined. Counsel cites no authority or rationale for this calculation.

As referenced by the director, the submission of a checking account statement showing \$4,381.23 in the petitioner's account as of December 31, 2001, does not demonstrate its ability to pay a proffered wage of \$39,748.80. It is \$35,367.57 less than the proffered salary. Nor do the two selected bank statements from March and April 2002 demonstrate a sustainable source out of which to pay the proffered wage. A petitioner's ability to pay the proffered salary must be shown as of the priority date and continuing until the beneficiary obtains lawful permanent resident status. 8 C.F.R. § 204.5(g)(2). Bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise would paint an inaccurate picture of the petitioner's status subsequent to 2000.

Counsel's reliance on the assets of the individual shareholders is also not persuasive. A corporation is a separate and distinct legal entity from its owners or stockholders. See *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); *Matter of M-*, 8 I&N Dec. 24 (BIA 1958; A.G. 1958). CIS will not consider the financial resources of individuals or entities who have no legal obligation to pay the wage. See *Sitar Restaurant v. Ashcroft*, 2003 WL 22203713, \*3 (D. Mass. Sept. 18, 2003).

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the record does not indicate that the petitioner has employed the alien beneficiary.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. In the instant case, as noted above, the petitioner's net income of \$5,720, as shown on its 2000 tax return, was \$34,028.80 less than the proffered wage. Similarly, its 2000 net current assets of \$16,236 was far short of the beneficiary's wage offer. As determined by the director, neither source was sufficient to cover the beneficiary's wage offer of \$39,748.80.

Counsel's assertion that *Matter of Sonogawa* is applicable where the expectations of increasing business and profits is not supported by the evidence contained in the record in this case. *Sonogawa* relates to petitions filed during uncharacteristically unprofitable or difficult years within a framework of profitable or successful years. During the year in which the petition was filed, the *Sonogawa* petitioner changed business locations, and paid rent on both the old and new locations for five months. There were large moving costs and a period of time when business could not be conducted. The Regional Commissioner determined that the prospects for a resumption of successful operations were well established. He noted that the petitioner had been in business for over 11 years and was a well-known fashion designer who had been featured in *Time* and *Look*. Her clients included movie actresses, society matrons and Miss Universe. The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. No unusual circumstances have been shown to exist in this case, which parallel those in *Sonogawa*. The petitioner in this case submitted only one tax return. It does not establish a framework of profitable years, but rather shows only that neither the petitioner's net income, nor its net

current assets were sufficient to support the alien beneficiary's proffered wage in the period just prior to the priority date.

With reference to a line of credit, it must be noted that it has not been established by first-hand evidence, that the petitioner, as a corporate entity, actually has a commercial line of credit with a lending institution. Counsel's assertions cannot be considered to constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). For the reasons stated above, a personal line of credit held by an individual shareholder will not be considered in reviewing a petitioner's ability to pay a proposed wage offer. It must also be noted that a "bank line" or "line of credit" is a bank's unenforceable commitment to make loans to a particular borrower up to a specified maximum during a specified time period. A line of credit is not a contractual or legal obligation on the part of the bank. See *Barron's Dictionary of Finance and Investment Terms*, 45 (1998). A petitioner's existent loans will be reflected in the balance sheet provided in a tax return or audited financial statement and will be fully considered in the evaluation of the corporation's net current assets. Comparable to the limit on a credit card, the line of credit will not generally be considered as cash or as a cash asset but as a potential liability.

Based on the evidence contained in the record and after consideration of the financial data further presented on appeal, it is concluded that the petitioner has failed to demonstrate its ability to pay the proffered as of the priority date of the petition and continuing until the present

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

**ORDER:** The AAO's summary dismissal of October 28, 2003 is withdrawn. The director's decision to deny the petition is affirmed. The appeal is hereby dismissed.